

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.841 OF 1987

1. Gani Shaikh Jamal, aged)
about 19 years, Occupation)
Service, residing at)
127/8 Kasba Peth, Pune.)
 2. Ismail Ebrahim Pathan, aged)
about 25 years, Occupation)
Business, residing at 861)
Kasba Peth, Pune.)
- Appellants
(Org.Accd.Nos.1 & 2)

Vs.

The State of Maharashtra Respondent

Mr. K.S. Patil with Mr. Deepak Girme for appellant no.1.

Mr. K.S. Patil for appellant no.2 as amicus curie.

Smt. V.R. Bhosale, APP for Respondent - State.

CORAM : S.S. PARKAR & R.S. MOHITE, JJ.

Date : August 10, 2004.

ORAL JUDGMENT (PER S.S. PARKAR, J.):

1. This appeal is filed challenging the Judgment and Order dated 26/8/1987 delivered by the Additional Sessions Judge, Pune convicting the appellants for offence under Section 302 read with Section 34 of IPC and sentencing them to RI for life in Sessions Case No.209 of 1987.

2. The prosecution case briefly stated is as follows:-

The incident took place in the afternoon on

19/4/1987. Deceased Mohammad Unus had attended the wedding of one Shabana in Savitribai Phule High School. When the meals were being served, the persons from the side of the bridegroom took their seats for taking meals. The appellants, who were attending the said wedding, also took their seats for taking meals. Deceased Unus told the appellants that persons from side of bridegroom would be served the meals first and thereafter rest of the people may take their meals. That annoyed appellant no.2 Ismail. He, therefore, abused deceased and left the place. In the night when deceased and his family members were sitting in front of their house at about 9.15 p.m., the accused came there and started abusing deceased. When he asked them not to abuse him, accused no.1 took out knife from his pant which was kept near the waist and stabbed deceased on the left side of his abdomen and thereafter both the accused ran away. Deceased was taken to the Sassoon Hospital by his mother where his statement was recorded which was treated as dying declaration and produced at Exh.27. The dying declaration of Mohammad Unus was treated as F.I.R., on the basis of which crime was registered, initially for offence under Section 324, thereafter under Section 326 and ultimately, after his death on 22/4/1987, the crime was registered for offence under Section 302 of

IPC. The statements of the witnesses were recorded, including the statements of eye witnesses like mother, son and wife of deceased so also the statements of Uncle of deceased and other witnesses. The accused were arrested on 22/4/1987. After his arrest, accused no.1 made a statement and produced the knife which was hidden by him after the incident. At the time of the arrest, the clothes of accused no.1 were attached under panchanama Exh.9. Stains like blood were seen on the shirt of accused no.1. The clothes of deceased, accused no.1 and knife (article no.3) were sent to C.A. for examination. As per the C.A. report blood of "O" group was found on the clothes of the deceased as well as on the knife. No blood was discovered on the shirt of accused no.1. After the investigation was over charge-sheet came to be filed and the case was committed to the Sessions Court.

3. Before the Sessions Court charge was framed under Section 302 read with Section 34 of IPC to which both the accused pleaded not guilty. On behalf of the prosecution 16 witnesses were examined, out of them PW 3 Jaibunissa Shaikh Fatim Mahammad, mother of deceased, PW 4 Nasir Unus Shaikh, son of the deceased, PW 5 Rashida Unus Shaikh, wife of deceased and PW 9 Shaikh Mahibub Abdul Razak Shaikh, Uncle of deceased

have been examined as eye witnesses to the incident. PW 1 is Vijaykumar Narayan Gat who had drawn the sketch of the scene of offence. Prosecution has examined PW 8 Dr. Kashinath Bade, who performed post-mortem on the dead body of deceased and PW 13 Dr. Jaysing Pardeshi who had examined deceased on his admission to the Sassoon Hospital and also made endorsement on the statement of deceased Exh.27. Apart from the aforesaid witnesses, there are police witnesses being PW 10 Police Head Constable Agand Gaikwad, who recorded the statement of deceased after his admission to the Sassoon Hospital. The investigation was carried out by PW 15 PSI Balkrishna Agashe initially and thereafter by PW 16 PI Suresh Kulkarni. The defence of the accused was of total denial.

4. After considering the entire evidence on record, the trial court convicted both the appellants for offence under Section 302 read with Section 34 of IPC and sentenced each of them to undergo RI for life. The said Judgment and Order of conviction is impugned in this appeal filed by both the convicted accused.

5. Mr. Patil, who is appearing for the appellants, contended, firstly, that so far as accused no.1 is

concerned, the dying declaration of deceased recorded immediately after the incident when the patient was admitted to the Sassoon Hospital gives the name of one Shiva as the assailant who was accompanied by accused no.2 Ismail, while the evidence of eye witnesses, who are the close relations of deceased like his mother, wife and son, have mentioned the name of accused no.1 as Gani Shaikh Jamal. Secondly, he contended that no overt act is attributed to accused no.2 except abusing deceased and he is said to only accompany the accused who stabbed deceased and, therefore, he cannot be convicted by virtue of Section 34 of IPC since the assailant is said to have taken knife from his pants which was kept near the waist and stabbed deceased. He submitted that accused no.1 not being named in the dying declaration which was recorded by the Head Constable and endorsed by the Medical Officer that the patient was fit to make a statement, the benefit of doubt should go to accused no.1 as his name is not mentioned in the dying declaration and consequently, accused no.2 is also entitled to acquittal. On the other hand the learned APP contended that the accused were known to eye witnesses who are the close relations of deceased and, therefore, their evidence cannot be discarded and the name of one Shiva given in the statement of deceased may have been written

through mistake by the Head Constable. She also submitted that there is a corroboration to the evidence of eye witnesses in as much as there is recovery of blood stained knife at the instance of accused no.1 on which, as per the C.A. report, the blood of the group of "O" was found which was also found on the clothes of the deceased.

6. After the incident in question deceased Mahammad Unus was taken to the Sassoon Hospital by his mother PW 3 Jaibunissa. After the patient was admitted in the hospital he was examined by PW 13 Dr.Pardeshi. He has mentioned the history of assault. He found following injury on the person of deceased :-

1. Incise wound vertically over left mid axillary line of the chest wall. About 2"x1/2"x1/2" and 3" deep. On exploration with gloved finger. Lungs tissue was felt. Bleeding through the wound was present.

He has deposed that the patient was given treatment and he was conscious and in a condition to speak and one police had recorded his statement after consulting him. On the said statement Exh.27 he had given certificate that the patient was in the state of giving verbal statement and he has signed below the said certificate at about 1.15 a.m. on 20/4/1987. At

:7:

4 a.m. he had performed an operation. The patient died on 22/4/1987 at about 4 p.m. Therefore, the dead body was sent for post-mortem examination. According to him the aforesaid injury was sufficient to cause the death in the ordinary course of nature.

7. Dr.Bade, who had performed autopsy on the dead body, is examined as PW 8. He had mentioned following external injuries on the dead body:-

1. Stitched incise wound in mid line of abdomen 5" below sternal notch with 13 stitches, measuring 8" in length.
2. Penetrating wound 15" below left mid cavicular point, measuring 1/2" x 1/4" Surgical drain.
3. Stab wound 5" below left axilla mid axillary line, measuring 1" x 1/2" margine and angles clean out.

On internal examination he found following injuries:-

1. Stab wound anterio lateral wall of stomach measuring 1/2" x 1/4" margine and angles clean cut and stomach wesempty.
2. Stitched incise wound on the peritoneum.
3. Spleen was removed (surgical method).

According to him all the injuries were antemortem

and cause of death was shock as a result of stab injury. He has stated that injury no.3 was possible by use of knife (Muddemal Article No.3). As there is no doubt that deceased had died homicidal death and his death was caused due to the stab injury with knife (Article No.3), there is no challenge to the medical evidence that the deceased had received homicidal death.

8. The dying declaration Exh.27 was recorded by the Head Constable Gaikwad PW 10. He has deposed that when he was on duty in Ramoshi Gate Police Chowky in Bhavani Peth, Pune, Mahiboob Shaikh PW 9, the Uncle of deceased, went there and informed about Unus having been stabbed with a knife by Ismail i.e. accused no.2 and his friend. He immediately went to the place of incident along with the witness and learnt that the injured was taken to the Sassoon Hospital. Then he went to the Sassoon Hospital after making note in the police diary. After the treatment was given to the patient, he asked the doctor whether he could record his statement and thereafter he recorded the statement of the injured. In his deposition also he has mentioned that injured had told that accused no.2 Ismail came there and started abusing him and thereafter his friend by name Shiva took out knife

from his pants and stabbed him. The statement of the patient was produced at Exh.27 on which the signature of the injured was taken and thereafter this witness also had signed. Thereafter he learnt that accused were in Kasba Peth and, therefore, he went to Kasba Peth but the accused were not found there. He then sent the statement of the deceased to Khadak Police Station for registering the offence along with report Exh.28.

9. The dying declaration Exh.27 mentions the name of assailant as Shiva at three places. The said statement mentions that the name of Ismail and his friend Shiva were residents of Kasba Peth and were visiting the house of their landlord at Bhavani Peth, Pune where deceased was residing. In the said statement there is mention about the marriage of his niece viz. Shabbu in Savitribai Phule School where accused no.2 Ismail Pathan was present and he told the latter that the friends will take the meals afterwards because of which Ismail abused him and went away. Thereafter in the night when he was sitting along with his mother, father and guest outside his house, Ismail along with his friend Shiva came there at about 9.15 p.m. and Ismail started abusing him and Shiva took out knife from his pant and stabbed in his abdomen.

Thus, in the dying declaration he mentions the name of one Shiva as assailant. The name of Shiva is repeated three times in the said dying declaration as a friend of accused no.2 Ismail.

10. No doubt the prosecution has led evidence of mother, wife and son of the deceased as eye witnesses to the incident and they have named accused no.1 Gani Shaikh Jamal as the assailant. All these witnesses have deposed that accused nos. 1 and 2 arrived at the place of incident in a rickshaw between 9 and 9.15 p.m. Accused No.2 Ismail abused the deceased and accused no.1 stabbed him with knife in his stomach and thereafter both the accused ran away. These witnesses have stated that accused no.2 Ismail enquired with the deceased as to what he said to the accused in the noon at the time of marriage. Apart from the minor discrepancies which are found in the evidence of eye witnesses which can be ignored, the main discrepancy which creates doubt is about the person who had assaulted the deceased with knife. The statement of deceased was recorded when, according to the doctor, he was in a fit condition to give statement and from the background of the incident, which is recorded in Exh.27, the dying declaration, it appears that deceased was understanding what he was saying. He has

even mentioned the place of residence of the two accused and named accused Shiva as the person who stabbed him with the knife who was the friend of accused no.2 Ismail with whom the incident had taken place in the afternoon at the time of taking meals in the wedding hall. The name of Shiva having been given by deceased in his statement which was recorded by PW 10 Head Constable Gaikwad and corroborated by the latter in his deposition in the Court, the doubt is created as to who was the assailant whether Shiva or accused no.1 Gani Shaikh Jamal.

11. The prosecution had not bothered to find out or bring on record whether any effort was made to find out the person by name Shiva from the locality called Kasba Peth which was mentioned in the dying declaration itself. From the evidence of the prosecution it is not clear why accused no.1 Gani Shaikh Jamal was arrested when the dying declaration mentions the name of one Shiva. No doubt the name of accused no.1 is given by the eye witnesses. Merely because the recovery was made at the instance of accused no.1 of a knife which was stained with blood group "O" which is that of deceased, it cannot be said with any certainty that the person who assaulted or stabbed deceased was none other than accused no.1 that

is Gani Shaikh Jamal. If the name of the accused no.2 was given correctly and other details have been given correctly by deceased while he was injured and was in the hospital in injured condition, it is difficult to say that the name of Shiva was given by deceased through mistake when he had also given the name of the locality where both the persons were residing. The prosecution ought to have made effort to find out whether any person by name Shiva was the resident of the locality named in the dying declaration and also explain why accused no.1 was arrested as the assailant of the deceased. It is also pertinent to note that while in the dying declaration mention is made only about appellant no.2 Ismail being present at the wedding of Shabana in the afternoon, the witnesses have deposed that both the appellants were present at the wedding and both of them left angrily after the deceased requested them to take meals after the relations of the bridegroom had finished their meals.

12. So far as accused no.2 is concerned, no overt act is attributed to him except that he was annoyed at the wedding and, therefore, left angrily from there after deceased requested him not to take meals before the relations of the bridegroom had taken meals. He had accompanied the assailant and is stated to have abused

the deceased in the night at the place of incident and thereafter the assailant took out knife from his pant and stabbed the deceased. When there is doubt about the person who had stabbed the deceased, accused no.2 cannot be convicted by application of Section 34 of IPC. We are, therefore, of the view that the benefit of doubt will have to be given to both the appellants and they are entitled for acquittal.

13. In the result, we allow the appeal and set aside the order of conviction and sentence recorded against the appellants by the Addl. Sessions Judge, Pune by his Judgment and Order dated 26/8/1987 in Sessions Case No.209 of 1987 and acquit them. Their bail bonds shall stand cancelled.

14. We record our appreciation of services rendered by Mr. K.S. Patil, who appeared on behalf of the appellant no.2 as amicus curie at the request of the Court and for arguing the matter fully on behalf of appellant no.2 as well.

(S.S. Parkar, J.)

:14:

(R.S. Mohite, J.)